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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

SEWELL PLASTICS, INC.,  
v. *Petitioner,*

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY

(Caption Continued on Inside Cover)

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

**REPLY BRIEF OF PETITIONER**

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*Respondents.*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
ARGUMENT	
I. SOUTHEASTERN'S "JOINT PRODUCTION VENTURE" DOES NOT EXCUSE <i>PER SE</i> TREATMENT OF THE SEPARATE BUYING AGREEMENT .....	1
II. SOUTHEASTERN'S "SUCCESS" ONLY FURTHER SHOWS HOW AND WHY THE EXCLUSIVE JOINT BUYING AGREEMENT IS INHERENTLY ANTI-COMPETITIVE .....	2
III. THE ELEVENTH CIRCUIT'S RECENT DECISION IN <i>KEY ENTERPRISES OF DELAWARE, INC. v. VENICE HOSPITAL</i> IS DIRECTLY IN CONFLICT WITH THE FOURTH CIRCUIT'S RULING HERE, FURTHER REFUTING RESPONDENTS' ARGUMENTS .....	6
A. "Legitimacy" of the Joint Production Venture .....	6
B. Antitrust Injury .....	7
C. Consumer Choice .....	8
CONCLUSION .....	10

## TABLE OF AUTHORITIES

CASES	Page
<i>Aspen Skiing Co. v. Aspen Highlands Skiing Corp.</i> , 472 U.S. 585 (1985) .....	9
<i>Associated General Contractors of California, Inc. v. California State Council of Carpenters</i> , 459 U.S. 519 (1983) .....	9
<i>Atlantic Richfield Co. v. USA Petroleum Co.</i> , 110 S. Ct. 1884 (1990) .....	8
<i>FTC v. Indiana Federation of Dentists</i> , 476 U.S. 447 (1986) .....	4, 9
<i>FTC v. Superior Court Trial Lawyers Association</i> , 110 S. Ct. 768 (1990) .....	1
<i>Key Enterprises of Delaware, Inc. v. Venice Hos- pital</i> , 919 F.2d 1550 (11th Cir. December 28, 1990) .....	<i>passim</i>
<i>Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.</i> , 472 U.S. 284 (1985) .....	2, 8
<i>Otter Tail Power Co. v. United States</i> , 410 U.S. 366 (1973) .....	4, 7
<i>United States v. Topco Associates, Inc.</i> , 405 U.S. 596 (1972) .....	2

## REPLY BRIEF OF PETITIONER

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In this Reply we respectfully urge:

- I. An exclusive joint buying agreement is not excused from *per se* principles just because the conspiring buyers agree to buy from a "joint production venture."
- II. Southeastern's so-called "success" only further shows how and why a sizable, exclusive joint buying agreement eliminates or restricts competition.
- III. The Eleventh Circuit's recent decision in *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550 (11th Cir. December 28, 1990), directly conflicts with the Fourth Circuit's ruling here, further refuting Respondents' arguments.

### **I. SOUTHEASTERN'S "JOINT PRODUCTION VENTURE" DOES NOT EXCUSE *PER SE* TREATMENT OF THE SEPARATE BUYING AGREEMENT.**

If *per se* principles still apply at all to *buying* agreements, what could be more inherently anti-competitive than a horizontal buying agreement which compels *every* participant to buy from the chosen supplier, regardless of *anything* which a single competing supplier could (and in this case, did) offer?

Respondents offer no genuine answer. They merely assert in conclusory fashion that the "scope of *per se* condemnation is narrow" and ordinarily does not apply to joint ventures. (Brief in Opp. 11.) But it is *not* the Southeastern bottle-making joint venture which is in issue; in issue is the separate and distinct buying agreement. It is also no answer that Southeastern has been successful and as a result, has "promoted" competition. As this Court explained in *FTC v. Superior Court Trial Lawyers Association*, 110 S. Ct. 768, 781 (1990), anti-competitive agreements are designed to achieve success for their beneficiaries.

Simply because the bottlers are not competitors at the retail level does not take away from the discouragement and elimination of competition at the *buying* level. This Court long ago made clear that the impact or effect of a plainly anti-competitive agreement on *another* level in the distribution chain cannot save *per se* condemnation. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609-10 (1972).

When all is said, this Court need look no further than the face of the Respondents' buying agreement to see that—as intended—it would and does “almost always” restrict or eliminate competition (*Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289-90 (1985)), and therefore constitutes a *per se* violation.

## II. SOUTHEASTERN'S “SUCCESS” ONLY FURTHER SHOWS HOW AND WHY THE EXCLUSIVE JOINT BUYING AGREEMENT IS INHERENTLY ANTI-COMPETITIVE.

The pervasive theme of Respondents' opposition—that the Southeastern cooperative, devoid of competition, has become a big success, yielding lower prices and related consumer benefits (Brief in Opp. 1-7)—further shows why the Writ should be granted: *Every* exclusive horizontal buying agreement of any meaningful size and duration likely would yield prices lower than the participants could obtain individually. In addition, because the excluded suppliers are left to compete in a shrunken market segment (here, a market reduced by about 40%), competition among them in *that* segment would naturally intensify, likely yielding lower prices there, too. In this way the agreement may be said to have “caused” lower prices in the overall market.

However, these superficially desirable effects on price are nothing but the natural and likely effects of the elimination—not promotion—of competition through the exclusive horizontal buying agreement. What is more, these effects are the same *regardless* of whether the

group's chosen supplier is a joint production venture or an independent supplier. In *either* case, the supplier has the unmistakable advantage of having his "success" assured. The supplier thus benefits from the certain knowledge that it has guaranteed sales volume in hand, allowing it to operate at maximum efficiencies.

Having such "success" assured, furthermore, also means that the chosen supplier need not be especially concerned with product quality or consumer preferences. This case readily proves it: Southeastern's buyers must take—and hence pass on to consumers—the type of bottle disfavored by the consuming public, which overwhelmingly prefers the type of bottle made by Sewell. Indeed, according to an independent consultant engaged by one large bottler, using the Southeastern bottle directly caused it to lose market share to competition. (Record 2489-93, 2499-510, 2551-54, 3592-611, 3612-13, 6403-06, 6433-66, 6469-84.)

While Southeastern's management is proclaiming the "success" it enjoys because it has a "high volume captive market" (Record 3684-92), field personnel of The Coca-Cola Company are not applauding: they concluded that Southeastern's bottles experience "a lot of failures and/or quality problems which seems to be related to the fact that the bottler is almost required to take anything that is delivered." (Record 5003R.) It is undeniable that the incentive to produce the best quality products is just not there when the buyer must take, in Coca-Cola's own words, "anything that is delivered."

Naturally, too, the chosen supplier can achieve lower costs than genuine competitors. But ultimately, one or more other suppliers will get discouraged, reducing their commitment to the business, or even determining to get out of the business.

*All* of these effects not only occurred in this case—as evidenced in, *inter alia*, four affidavits ignored by the lower courts (and by Respondents' Brief in Opposition) (Record 1954-58, 1961-63, 1977-78, 2060-65), *but they*

*represent the likely effects of every sizable exclusive horizontal buying agreement which permits no competition.*<sup>1</sup>

No legitimate justification exists to compel each buyer to buy from the chosen supplier for five years, regardless of what another supplier could offer. Having a "captive market" is not "necessary" to the formation and operation of *any* supplier, whether a joint production venture or otherwise. The belief that a five-year "captive market" was necessary in order for the joint production venture to become viable only evidences the belief that the venture would be unable to stand on its own feet, a "justification" precisely rejected by this Court in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973):

[The Sherman] Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency.

This is because antitrust laws protect the competitive process itself, the "ordinary give and take of the market place." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986). Absolutely *nothing* in Respondents' fact-laden Opposition can mask or divert attention from what happened to the *competitive process itself* in this case.

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<sup>1</sup> The four affidavits alone—explaining how the competitive process was so severely diminished that suppliers determined to get out of the business—evidence the substantial fact issues which abounded.

For another example of sharply disputed facts, although Respondents glibly refer to themselves as "small to mid-sized bottlers," at least three of them—among the largest in the entire Coca-Cola system—had enough volume to readily justify individual bottle-making operations, according to Coca-Cola's *own* study. (Record 5727-833.) Even the district court acknowledged the parties' fact dispute over the minimum volume necessary to economically justify a bottle-making operation. (App. 36a.)

Respondents' conclusory assertion that no genuine fact issues existed (Brief in Opp. 21-22) is disingenuous. (Of course, the existence of fact issues was expressly recognized in the district court's *first* summary judgment opinion.) (App. 91a-93a.)

Compare the competitive process BEFORE and AFTER the Southeastern arrangement:

BEFORE

*The Market*

Several Suppliers  
Compete For 100%  
of the Entire Market

*The Competitive Process*

- buyers and sellers negotiate individual contracts. (Record 1738, 2154, 2902-04, 3130-32.)
- buyers can switch suppliers for a lower price at any time. (Record 1953-55, 1969-70, 1972-75, 1987-90, 2902-04, 3397-99.)
- buyers make individual choices of product type and services. (Record 1954, 1956, 1960, 1977-80, 3462-63, 3471-72, 3482-83, 3910.)

AFTER

*The Market*

In Southeastern's  
Captive Market (Now  
Representing Roughly  
40%): No Competition  
At All

Independent  
Suppliers Can  
Compete For the  
Remaining 60%  
Segment Only

*The Competitive Process*

- no single independent supplier can compete in Southeastern's segment *regardless of price* (or other consideration). (Record 1961, 5638.)
- Southeastern buyers forego individual choice of product type and service. (Record 2664-67.)
- Southeastern buyers must take what is delivered. (Record 5003R.)
- Some "want out altogether," but cannot withdraw. (Record 3683.)

Taking at face value Respondents' proclamation of Southeastern's success by virtue of a "high volume captive market," we respectfully ask whether such "success" from the outright elimination of competition in a large market segment is what the antitrust laws contemplate, and we urge that the Writ be granted to instruct that they do not.

**III. THE ELEVENTH CIRCUIT'S RECENT DECISION IN *KEY ENTERPRISES OF DELAWARE, INC. v. VENICE HOSPITAL* IS DIRECTLY IN CONFLICT WITH THE FOURTH CIRCUIT'S RULING HERE, FURTHER REFUTING RESPONDENTS' ARGUMENTS.**

In its recent *Key Enterprises* decision, the Eleventh Circuit was faced with a joint venture (between a hospital and a medical equipment supplier) to supply medical equipment to patients. The circumstances were similar to this case:

- the joint venture strategy was to sell to a "captive" market, there comprised of the hospital's patients (*Key Enterprises*, 919 F.2d at 1553-55);
- the captive customers accounted for about 39% of the market (*Id.* at 1553);
- prices "have actually gone down" (*Id.* at 1560 n.7); and
- the market became less concentrated after the joint venture was formed, under the Herfindahl-Hirshman Index. (*Id.*)

In reversing the district court's grant of judgment n.o.v. to defendants, the Eleventh Circuit relied on established antitrust principles which were rejected or disregarded by the Fourth Circuit here, and which are directly at odds with Respondents' arguments:

A. "Legitimacy" of ~~The~~ Joint Production Venture. As Respondents do here (Brief in Opp. 9), the *Key Enterprises* defendants sought to shift the Court's focus from the challenged agreement to the "legitimacy" of the joint venture itself. The Eleventh Circuit acknowledged, however, that the joint venture was "legitimate," but properly observed that what was in issue was "the manner in which the defendants implemented the joint venture . . . ." *Key Enterprises*, 919 F.2d at 1558 (emphasis added).

Unlike the Eleventh Circuit, however, the district court and Fourth Circuit failed to make a clear distinction between the joint production venture and the horizontal agreement used to "implement it." Instead, the district court, approved by the Fourth Circuit, simply declared that because the formation of Southeastern was legitimate, the buying agreement—as a matter of law—was "reasonably necessary" to achieve "legitimate pro-competitive purposes." (App. 58a-59a.)

The same argument would have entitled defendants in *Key Enterprises* to prevail as a matter of law. Recognizing that this kind of "justification" has been rejected since at least *Otter Tail Power Co. v. United States*, *supra*, the Eleventh Circuit reinstated a jury verdict for plaintiff. In stark contrast, Sewell was deprived of even presenting its case to a jury.

**B. Antitrust Injury.** By focusing on the Southeastern bottle-making facility instead of the horizontal buying agreement, the lower courts and Respondents recharacterize Sewell's case as a challenge to Southeastern's "presence" as a competitor in the market. As a result, the lower courts ruled, and Respondents now continue to urge (Brief in Opp. 20-21) that Sewell has not shown "antitrust injury," because it is really complaining about competition arising out of Southeastern's presence in the market. The Eleventh Circuit in *Key Enterprises* found the same reasoning to be erroneous:

[Plaintiff] claims that defendants' practices have unreasonably restricted competition by channeling patient choice to defendants and by excluding all competing [suppliers'] access to [defendants'] patients. The antitrust laws were intended to prevent unreasonably exclusionary practices. [Plaintiff's] injury flows directly from that which makes the defendants' acts unlawful.

*Key Enterprises*, 919 F.2d at 1559.

Here, too, Sewell's injury could not flow more directly from the exclusive horizontal buying agreement which constitutes the violation: as in *Key Enterprises*, Sewell

and other independent suppliers were unable to have access to the captive customers. *See also Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985); *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990).<sup>2</sup>

**C. Consumer Choice.** There is also no reconciling the conflicting holdings of the Fourth and Eleventh Circuits on whether restricting consumer choice represents injury to competition. *Preliminarily, here, the district court expressly acknowledged that consumers preferred the type of bottle made by Sewell and other independent manufacturers.* (App. 45a.)<sup>3</sup>

Turning the antitrust laws upside down, however, the lower courts actually ruled that *because* the consumer *had* to buy Coca-Cola products in the disfavored Southeastern-type bottle, there was no "consumer choice" injury because the consumer went ahead and bought Coca-Cola products in the disfavored package anyway.<sup>4</sup> The

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<sup>2</sup> In fact, Sewell had much more direct evidence of injury than the plaintiff in *Key Enterprises*. In at least three instances there was evidence of bottlers' desire to resume buying from Sewell, with one bottler executive's notes stating, "We want out [of Southeastern] altogether." (Record 3683.) Also, an affidavit submitted by Sewell recounted how yet another bottler told an independent supplier not to bother making an offer, for the bottlers *had* to buy from Southeastern *regardless* of price. (Record 1961.) The standard 5-year, 80% requirements contract to which all agreed *explicitly* provided as much. (App. 39a.)

<sup>3</sup> Indeed, the evidence was compelling—one independent consultant engaged by a large bottler to ascertain why the bottler was *losing* market share found a 77% preference in favor of the type of bottle made by Sewell and other independent manufacturers. (Record 3592-611.) It is hardly surprising that *before* the exclusive horizontal buying agreement was implemented, bottlers in exercising individual freedom of choice consistently bought the preferred Sewell-type bottle, thereby genuinely serving their own customers' wants and needs.

<sup>4</sup> On the evidence, this flatly disregards one large bottler's own independent consultant's study that the bottler, in fact, *was* losing market share because it was using the Southeastern bottle. (Record 3592-611.)

*Key Enterprises* Court, however, held “the channeling of patient choice is sufficient to show injury to consumers” (*Key Enterprises*, 919 F.2d at 1559), consistent with this Court’s teachings on non-monetary ‘consumer choice’ injury in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) (“Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect.”).

Disregarding consumer preference here, in the words of this Court in *Associated General Contractors*, was and is “inherently destructive of competitive conditions.”

\* \* \* \*

In short, the Eleventh Circuit in *Key Enterprises* did not lose sight of the competitive process. The Court made no ultimate determination of whether the buyers were better off if the exclusionary practices were allowed to succeed. The Fourth Circuit here did just that, going so far as to affirm the district court’s last-minute decision granting summary judgment shortly after a jury trial began. The district court and Fourth Circuit took it upon themselves to conclude that the consumer in the Southeastern area is better off by buying the type of product forced on him. At a minimum, that is for a jury to decide.<sup>5</sup>

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<sup>5</sup> Much of Respondents’ presentation is comprised of disparaging references to Sewell—apparently intended to show Sewell to be an unworthy Petitioner—which do not warrant textual reply in this Brief. Sewell, for example, is portrayed as a monolithic ogre, charging higher and higher prices and reaping unwarranted high profits before Southeastern came into existence. (Brief in Opp. 2.) This is not only irrelevant—Sewell’s management was obligated to maximize its shareholders’ investment as much as, say, Coca-Cola’s management—but deceptive: In accordance with individual contracts, prices were adjusted upward *and* downward to reflect actual, demon-

## CONCLUSION

As a seller, Sewell respectfully asks the Court to delineate the fundamental ground rules for exclusive horizontal buying conduct. If Sewell is correct in distinguishing the buying agreement from the joint production venture, *per se* rules would—and should—apply. The unerring truth is that the buying agreement was implemented to make sure that Sewell (and other independent suppliers) cannot compete. That is exactly what *per se* rules condemn. But even if the buying agreement is not *per se* unlawful, as in *Key Enterprises*, Sewell was entitled to a Rule of Reason trial.

For the reasons set forth in the Petition and in this Reply, a Writ of Certiorari should be granted.

Respectfully submitted,

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strated changes in manufacturing costs. (Record 1972-75, 1987-90, 2028-57.)

Respondents likewise portray as sinister Sewell's efforts to offer lower prices to bottlers to keep them from forming Southeastern (Brief in Opp. 7-8), when that is nothing but competition.

In a different vein, Respondents attack the efforts of Sewell and its counsel to achieve a settlement of the dispute, efforts which were entirely proper and professional, and consistent, of course, with public policy in favor of settlement. It seems rather desperate, we must suggest, to attempt to so divert the genuine issues presented on this Petition by resort to such an unseemly attack.